U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: July 9. 1998

Case No.: 97 INA 389

In the Matter of

2825 EIGHT AVENUE ASSOCIATES,
Employer

in behalf of

NORMAN ANDERSON,
Alien

Appearance: D. L. Roggi, Esq., of New York, New York, for Employer and Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of NORMAN ANDERSON ("Alien") by 2825 EIGHT AVENUE ASSOCIATES ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On February 10, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Maintenance Repairer" in the Employer's firm, which was engaged in the business of property management. AF 80-81. The position was classified as an "Maintenance Repairer, Building," under DOT Occupational Code No. 899.381-010. The Employer described the job duties as follows:

> Repair and maintain buildings by replacing defective electrical switches and fixtures and repairs to structure, woodwork and plumbing, using hand and power tools. Maintain and service equipment to provide light and power to buildings.

AF 81, Item 13. The minimum education for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was completion of high school, but no training was specified. The experience requirement was two years in the Job Offered. *Id.*, at Items 14 and 15.[2] The names and resumes of twenty-one U. S. workers were given to the Employer by the State Employment Security Agency ("SESA"), which rejected all applicants. AF 91-170.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated August 23, 1996. AF 174-178. (1) Citing 20 CFR § 656.21(b)(5), the CO said, "Employer indicates that 2 years experience in the job offered is required for the performance of the job. It is noted that the alien had no experience in this occupations prior to his employment with this employer. The Employer apparently trained the alien for this employment and must fully document why it is not feasible for him to train someone else at this time or he may submit evidence which clearly shows that the alien at the time of hire had the qualifications which the employer is now requiring or he may reduce his requirements to that which the alien had at the time of hire." The CO then discussed the evidence of record and described the further documentation the Employer was directed to file on rebuttal as to this issue. AF 176-177. (2) Citing 20 CFR §§ 656.20(c)(8), 656.21(b)(6), and 656.24(b)(2)(ii), the NOF discussed the standards by which the qualification of U. S. workers for the job are to be appraised under the Act and regulations. The CO then stated that the Employer's rejection of the following job applicants was unlawful: Bryant, Ramos, Irizarry, Rivera, Boddie, Gopy, and Rodriguez. Although the Employer's contacts were untimely, having been sent some three weeks after the applicants's resumes were referred, the

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[2]The hours were 3:00 PM to 11:00 PM in a forty hour week at $11.00 per hour, with time and a half for overtime as needed. The basic hourly rate was $14.06, and $21.09 per hour for overtime, sa required. The hiring criteria listed the following under Other Special Requirements: "Written verifiable reference."

Employer rejected many of the applicants because it did not have replies from them, and six of the applicants listed above reported no contact from the Employer. Based on this evidence, the CO questioned the *bona fides* of the Employer's recruiting and set out the evidence required to rebut these findings. AF 174-176.[3]

Rebuttal. The Employer's September 24, 1996, rebuttal addressed the issues stated in the NOF. AF 177-224. After examining the NOF, the Employer construed the following to be the sole issues that it presented: (1) "Whether it is feasible for the Employer to train a U. S. worker for the job," and (2) "Whether six of the twenty-one applicants who applied for the job in question were ready, willing and able to perform the required duties." AF 224. The Employer asserted that the Alien 's experienced Maintenance Repairer trained the Alien in the required duties, but no longer is available to do so. The Employer then described its efforts to contact U. S. workers Bryant, Ramos, Rivera, Boddie, Gopy, and Rodriguez, and offered reasons for its rejection of their applications for the position because of "lack of interest." The Employer asserted that the resumes for all of the referred workers were sent by the SESA on or about November 9, 1995, and arrived some seven days later, and that it mailed out certified letters on December 6, 1995, which the Employer said was within fourteen business days later. AF 215. As the SESA contacts with the U. S. workers referred occurred on December 5, 1995, none of the job applicants could have received Employer's certified letter at the time of this survey, it added.

Final Determination. The CO denied certification in the Final Determination issued on November 4, 1996, based on 20 CFR §§ 656.20(c)(8), 656.21(b)(5), 656.21(b)(6), and 656.24(b)(2)(ii). AF 225-228. Noting the Employer's rejection of Bryant, Ramos Rivera, Boddie, Gopy, and Rodriguez, the CO first discussed the Employer's speculation as to the dates of delivery of the resumes sent out by the SESA. AF 226. The CO then took note of the test that it administered to the job applicants whom it found to be unqualified. AF 225.
The CO said that the Employer's application had failed to list taking its plumbing test as a hiring criterion, however, and that such an undisclosed requirement was restrictive, further noting that the Employer cannot add requirements after advertising in what appeared to be an effort to disqualify U. S. applicants. The six rejected job applicants appeared qualified by their resumes, said the CO, and the Employer had an obligation to contact and interview them in a timely manner, which it failed to do.

The CO further found that the Employer's rebuttal failed to provide evidence supporting its contention that it had, in fact, made the telephone calls to the six listed U. S. workers before attempting to contact them by mail one month after it published the recruiting advertisements and three weeks after receiving their resumes. In denying labor certification under the Act and regulations, the CO concluded that the Employer failed to document good faith efforts to recruit for this position, that it failed to contact qualified U. S. applicants successfully, and that it had

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[3]Under 20 CFR § 656.21(b)(2)(ii), the CO must consider a U. S. worker qualified for the job if by education, training, experience, or a combination of these the worker is able to perform the duties of the occupation as these are customarily performed by other U. S. workers similarly situated.

failed to interview them in a timely manner. AF 225.

Appeal. Following the denial of certification, on December 12, 1996, the Employer requested review of the Final Determination. Employer later filed a brief on August 12, 1997, in which it argued (1) that the CO's finding that its requirement that the job applicant pass a job test was a restrictive hiring criterion raised a new issue that it did not have an opportunity to rebut; (2) that the Final Determination description of the evidence it failed to present in rebuttal to prove the asserted phone calls to the listed applicants, the time of day when such calls were made, or the persons to whom the Employer spoke was error in that the CO did not require such items of evidence in the NOF; (3) that the CO's rejection of the Employer's explanation of its failure to make timely contacts with the applicants during the two weeks after it received the resumes in accordance with the cover letter by the SESA was arbitrary and capricious; (4) that the Employer's attempts to use an alternate means of contact with the U. S. workers referred were made in good faith; and (5) that the Employer rejected the referred U. S. workers for reasons that were lawful and job related under 20 CFR § 656.21(b)(6).

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification.

The Employer's contentions regarding an asserted "new issue" and the assertion of error based on the finding that it failed to present evidence to support its conclusory statements are disingenuous and mistaken. The Employer, itself, injected its discussion of a telephone test by way of justifying its failure to make contact with the named U. S. workers. The CO did not base the denial of certification on this restrictive job requirement, but rejected its evidentiary value in supporting Employer's contention that the workers were not timely contacted.[4] This was confirmed in the Employer's argument that, even if contacted, these applicants were unworthy of being hired in spite of the inferences drawn from their resumes. Similarly, the CO referred to the lack of specific types of supporting proof in the course of telling the Employer what it had omitted from its rebuttal in the course of explaining the rejection of the Employer's proof of fact. Consequently, these appellate arguments lack merit and are rejected.

The CO's rejection of the Employer's explanation of its failure to make timely contacts with the applicants during the two weeks after it received the resumes in accordance with the cover letter by the SESA and its of an alternate means of contact with the U. S. workers referred as good faith recruitment was based on sufficient evidence, notwithstanding the Employer's arguments to the contrary. The Employer's argument that it lost time in making repeated telephone calls was not based on persuasive proof, as the CO explained in the Final

[4] **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*).

Determination, *supra*. Employer's rebuttal statements and speculation as to date were given without supporting evidence were insufficient to carry its burden of proof. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*).[5] Although in this way it could be said that the Employer ostensibly complied with the directions to file evidence supporting its position on the issues the NOF raised in this case, the CO was not persuaded because the facts sought were not divulged in Employer's vague assertions, which offered no explicit data, specific examples, or anything other than general statements that appeared unconnected with tangible data. Moreover, as it was not prevented from mailing out written interview requests as soon as the resumes were received in hand, the Employer had control of its own actions at all times germane to this proceeding and its recruiting procedure throughout was its own. Finally, the Employer's rejection of the referred U. S. workers was not shown to be for reasons that were lawful and job related under 20 CFR § 656.21(b)(6), as the NOF explained at AF 174-176.

For these reasons the panel has concluded that the rejection of Employer's application for alien labor certification by the CO is supported by sufficient evidence of record in this case. As the conclusion of the Certifying Officer denying alien labor certification was supported by the evidence of record and should be affirmed. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

[5]To the same effect see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.,** 88 INA 686 (Feb. 17, 1989)..

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.